Germanischer Llyod Industrial Services Asia Sdn Bhd & Ors v Raza Amin & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-567–10 OF 2019
YAACOB MD SAM, RAVINTHRAN AND GHAZALI CHA JJCA
27 SEPTEMBER 2022

Civil Procedure — Judicial review — Award of Industrial Court ('IC') — Whether High Court wrongly quashed IC's award by substituting IC's findings of fact with its own views and taking into account unpleaded issues — Whether there was improper judicial appreciation of the evidence — Whether given seriousness of claimant's misconduct his transfer to different job portfolio was not disproportionate and harsh punishment — Whether company was justified in losing trust and confidence in claimant and finding he was no longer suitable to hold senior-most managerial position

The first respondent ('the claimant') was employed by the first appellant ('the company') as its country manager for oil and gas in Kuala Lumpur. It was the company's senior-most managerial position in Malaysia for the oil and gas sector. The company took disciplinary action against the claimant when it found that under his watch some of the company's employees had, over several months, inflated their timesheet recordings which caused the company to overcharge its clients in two projects for work done. The company noted that although the claimant was alerted about the inflated timesheets issue and resultant overbilling of clients, he did nothing to put a stop to the practice. As punishment, the claimant was moved to the position of senior principal consultant, which was a grade lower than country manager, but without any change in his basic salary. Apart from the claimant, 25 other employees, including four managerial staff, were disciplined for their involvement in the inflated timesheet cum overbilling scandal. The claimant considered his demotion as a constructive dismissal and filed a representation concerning the matter with the Industrial Relations Department. His complaint was eventually referred to the Industrial Court for adjudication. After a trial, the Industrial Court found that the claimant's constructive dismissal was with just cause or excuse. The decision was quashed by the High Court in a judicial review application filed by the claimant. In coming to its decision, the Industrial Court found that the claimant's failure to address and stop the practice of inflating timesheets and overbilling clients had embarrassed and injured the reputation and business interests of the appellants and made the claimant unsuitable to hold the position of country manager any longer. On another issue of an application for a job in the company made by one Tahir Naeem ('Tahir'), the Industrial Court found that the claimant had not

disclosed the fact that he and his wife knew Tahir well. In the instant appeal, the company submitted that the High Court had wrongly quashed the Industrial Court's award by treating the judicial review proceedings as an appeal and by substituting the findings of fact made by the Industrial Court with its own views. The company said the High Court had also considered grounds which were never pleaded in the Industrial Court.

Held, unanimously allowing the appeal, setting aside the High Court's decision and reinstating the decision of the Industrial Court:

(1) The High Court should not have interfered with the findings of fact made by the Industrial Court which clearly accorded with the evidence adduced before it. By such interference, the High Court came to certain erroneous findings which were wholly unsupported by the evidence. The various errors and misdirection committed by the High Court judge in allowing the judicial review application warranted appellate intervention to set aside his decision (see paras 41–42 & 58).

(2) The High Court judge appeared to have overlooked the inherent probabilities of the case, resulting in his making inconsistent findings on the question of the claimant's knowledge with regard to the inflated timesheets issue and the appointment of Tahir Naeem. Although the evidence was abundantly clear, the High Court judge in his grounds of judgment vacillated between finding that the claimant was aware of the inflated timesheets issue and then finding that he was not aware of it. If the judge had properly evaluated all of the evidence, he would have come to the conclusion that the claimant's version was wholly improbable and that the Industrial Court was right in its decision (see paras 43, 46–47 & 52).

(3) Regarding Tahir Naeem's appointment, the High Court judge's finding that the claimant was not involved in his recruitment was plainly wrong in the light of evidence that it was the claimant who forwarded Tahir's curriculum vitae to the human resources manager and also signed off on the decision to recruit Tahir as well as his remuneration package (see para 48).

(4) The High Court judge's finding that the claimant's dismissal was disproportionate and too harsh was not reasonable. The claimant was re-designated to the most senior technical position without any change in his basic salary notwithstanding the severity of the inflated timesheets issue which resulted in the company's clients being overcharged. The re-designation was consistent with the terms of the claimant's contract of employment which provided that his position and responsibilities were liable to change to meet the company's requirements. The contract did not guarantee that he would remain as country manager until his retirement. In addition, the Industrial Court found that as a result of the

A inflated timesheets issue, the company was justified in losing its trust and confidence in the claimant as country manager and in finding that he was no longer suitable for that position (see paras 14 & 54–55).

[Bahasa Malaysia summary

B Responden pertama ('penuntut') telah diambil bekerja oleh perayu pertama ('syarikat tersebut') sebagai pengurus negara bagi minyak dan gas di Kuala Lumpur. Ia merupakan jawatan pengurusan paling kanan syarikat di Malaysia untuk sektor minyak dan gas. Syarikat tersebut mengambil tindakan tatatertib terhadap penuntut apabila mendapati di bawah pengawasannya beberapa C pekerja syarikat telah, selama beberapa bulan, melambungkan rakaman helaian masa mereka yang menyebabkan syarikat tersebut mengenakan bayaran berlebihan kepada pelanggannya dalam dua projek untuk kerja yang dilakukan. Syarikat tersebut menyatakan bahawa walaupun penuntut telah dimaklumkan tentang isu helaian masa yang melambung dan akibat D pengebilan berlebihan pelanggan, beliau tidak melakukan apa-apa untuk menghentikan amalan tersebut. Sebagai hukuman, penuntut telah dipindahkan ke jawatan perunding utama kanan, iaitu gred yang lebih rendah daripada pengurus negara, tetapi tanpa sebarang perubahan dalam gaji pokoknya. Selain penuntut, 25 pekerja lain, termasuk empat kakitangan E pengurusan, dikenakan tindakan disiplin kerana penglibatan mereka dalam helaian masa yang melambung dan skandal lebihan bil. Penuntut menganggap penurunan pangkatnya sebagai pemecatan konstruktif dan memfailkan representasi berhubung perkara tersebut dengan Jabatan Perhubungan Perusahaan. Aduannya akhirnya dirujuk ke Mahkamah Perusahaan untuk F penghakiman. Selepas perbicaraan, Mahkamah Perusahaan mendapati bahawa pemecatan konstruktif penuntut adalah dengan sebab atau alasan yang adil. Keputusan tersebut telah dibatalkan oleh Mahkamah Tinggi dalam permohonan semakan kehakiman yang difailkan oleh penuntut. Dalam membuat keputusannya, Mahkamah Perusahaan mendapati kegagalan G penuntut untuk menangani dan menghentikan amalan melambung helaian masa dan pengebilan berlebihan pelanggan telah memalukan dan merosakkan reputasi dan kepentingan perniagaan perayu dan menyebabkan penuntut tidak sesuai untuk memegang jawatan pengurus negara. Mengenai satu lagi isu permohonan kerja di syarikat yang dibuat oleh seorang Tahir Naeem ('Tahir'), H Mahkamah Perusahaan mendapati penuntut tidak mendedahkan fakta bahawa beliau dan isterinya mengenali Tahir dengan baik. Dalam rayuan semasa, syarikat tersebut berhujah bahawa Mahkamah Tinggi telah tersilap membatalkan award Mahkamah Perusahaan dengan menganggap prosiding semakan kehakiman sebagai rayuan dan dengan menggantikan dapatan fakta I yang dibuat oleh Mahkamah Perusahaan dengan pandangannya sendiri. Syarikat tersebut berkata Mahkamah Tinggi juga telah mempertimbangkan alasan yang tidak pernah dirayu di Mahkamah Perusahaan.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan

Mahkamah Tinggi dan mengembalikan semula keputusan Mahkamah Perusahaan:

(1) Mahkamah Tinggi tidak sepatutnya campur tangan dengan dapatan fakta yang dibuat oleh Mahkamah Perusahaan yang jelas bersesuaian dengan keterangan yang dikemukakan di hadapannya. Dengan campur tangan sedemikian, Mahkamah Tinggi membuat beberapa dapatan yang salah yang tidak disokong sepenuhnya oleh keterangan. Pelbagai kesilapan dan salah arah yang dilakukan oleh hakim Mahkamah Tinggi dalam membenarkan permohonan semakan kehakiman memerlukan campur tangan rayuan untuk mengetepikan keputusannya (lihat perenggan 41–42 & 58).

(2) Hakim Mahkamah Tinggi nampaknya telah terlepas pandang kebarangkalian yang wujud dalam kes tersebut, menyebabkan beliau membuat dapatan yang tidak konsisten mengenai persoalan pengetahuan pihak yang menuntut berkenaan dengan isu helaian masa yang melambung dan pelantikan Tahir Naeem. Walaupun keterangannya sangat jelas, hakim Mahkamah Tinggi dalam alasan penghakimannya terumbang-ambing antara mendapati pihak yang menuntut menyedari isu helaian masa yang melambung dan kemudian mendapati bahawa beliau tidak menyedarinya. Jika hakim telah menilai dengan betul semua keterangan, beliau akan membuat kesimpulan bahawa versi penuntut adalah mustahil sepenuhnya dan Mahkamah Perusahaan adalah betul dalam keputusannya (lihat perenggan 43, 46–47 & 52).

(3) Berkenaan pelantikan Tahir Naeem, keputusan hakim Mahkamah Tinggi bahawa penuntut tidak terlibat dalam pengambilannya adalah jelas salah berdasarkan keterangan bahawa penuntut telah memajukan *curriculum vitae* Tahir kepada pengurus sumber manusia dan juga menandatangani pada keputusan untuk mengambil Tahir serta pakej imbuhannya (lihat perenggan 48).

(4) Dapatan hakim Mahkamah Tinggi bahawa pemecatan pihak yang menuntut adalah tidak seimbang dan terlalu keras adalah tidak munasabah. Pihak yang menuntut telah dilantik semula ke jawatan teknikal paling kanan tanpa sebarang perubahan dalam gaji pokoknya walaupun isu helaian masa yang melambung tinggi yang mengakibatkan pelanggan syarikat dikenakan bayaran berlebihan. Penamaan semula tersebut selaras dengan syarat kontrak pekerjaan penuntut yang memperuntukkan bahawa kedudukan dan tanggungjawabnya boleh diubah untuk memenuhi keperluan syarikat. Kontrak tersebut tidak menjamin bahawa beliau akan kekal sebagai pengurus negara sehingga bersara. Di samping itu, Mahkamah Perusahaan mendapati bahawa akibat daripada isu helaian masa yang melambung, syarikat wajar kehilangan kepercayaan dan keyakinannya terhadap penuntut sebagai

pengurus negara dan mendapati bahawa beliau tidak lagi sesuai untuk jawatan tersebut (lihat perenggan 14 & 54–55).]

Cases referred to

Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 5 MLJ 58; [2020] 6 CLJ 557, FC (refd)
Chong Sooi Chuan v Yuen Lai Choon [1988] 2 MLJ 443, SC (refd)
Eurymedon, The (1942) 73 Lloyd LR 217, HL (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)
Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)
Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605, FC (folld)
Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, HC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Siti Aishah binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124, FC (refd)
Watt or Thomas v Thomas [1947] AC 484, HL (refd)
Yahya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117, PC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20, 20(1), (3)

Appeal from: Judicial Review No WA-25–126–03 of 2019 (High Court, Kuala Lumpur)

Siva Kumar Kanagasabai (with Foo Siew Li and Adam Thye Yong Wei) (Skrine) for the appellant.
Terence Chan Kah Meng (with Goh Tseng Fook, Bryan and Harvey Ng Yih Xiang) (Lim Kian Leong & Co) for the respondent.

Ghazali Cha JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in quashing the award of the Industrial Court dated 18 December 2018 pursuant to a reference under s 20 of the Industrial Relations Act 1967 ('the IRA').

[2] The central issue in this appeal is whether the constructive dismissal of the first respondent by the first appellant was with just cause and excuse.

[3] After carefully considering parties' written submissions and upon hearing oral submissions and the authorities cited therein, we were of the view that there are merits in the appellants' appeal and as such, we unanimously

allowed the appeal with costs of RM15,000 subject to payment of allocator fee. In view thereof the decision and order of the High Court is set aside and the award of the Industrial Court reinstated.

[4] We now provide our reasons for the said decision.

[5] The first respondent shall be referred as the claimant and first appellant as the company in this appeal. The claimant is the former country manager of the company until the change of his position from country manager to senior principal consultant on 10 March 2016.

[6] The second and third appellants are the company's associated companies sharing common management.

PRELIMINARIES

[7] The facts of this appeal are as gleaned and modified from the judgments of the court's below, submissions of parties and other cause papers filed in the judicial review application.

[8] This case began when the claimant filed his representation to the Industrial Relations Department under s 20(1) of the Industrial Relations Act 1967 ('the IRA') challenging his constructive dismissal because of the demotion. His representation was then referred to the Industrial Court by the Minister pursuant to s 20(3) of the IRA.

[9] The claimant filed an application for judicial review in the High Court to quash the decision of the Industrial Court which found that the claimant was constructively dismissed but it was with just cause and excuse.

[10] On 10 September 2019, the High Court allowed the claimant's application for judicial review and quashed the award of the Industrial Court.

[11] Hence, the present appeal.

BACKGROUND FACTS

General context

[12] The case before us centered on the issue of constructive dismissal following the re-designation of the claimant from the position of country manager to senior principal consultant in view of the issue of overcharging of the company's clients due to inflated timesheets committed by the employees of the company under the watch of the claimant as its then country manager.

[13] It is therefore relevant for us to set out the background and nature of the claimant's employment. The claimant began working for the company on 1 April 2011. From 1 January 2014 the claimant was made the country manager for oil and gas, the senior most position in Malaysia for the oil and gas business.

[14] Pursuant to cl 7 of the claimant's contract of employment dated 22 December 2014 following the merger of Det Norske Veritas ('DNV') and Germanischer Lloyd ('GL'), it is noteworthy that the company could change the claimant's position and responsibilities to meet its business requirements. The claimant's last drawn monthly salary was RM84,620.58.

[15] The claimant reported to the regional manager, Arve Johan who was based in Singapore.

[16] The DNV GL Management System Group ('DMSG') sets out the company's code of conduct, functional descriptions, policies, processes, tools and instructions that are applicable to all employees. Amongst others the DMSG requires each employee to record hours correctly on projects. All works and travel hours are also to be accurately registered. Paragraph 3 of the DMSG requires the management to oversee that timesheet are accurately registered.

[17] The above is important because most of the company's clients in Malaysia are charged based on time costs. Invoices are raised based on accurate time recording and reporting.

[18] From October 2014 the claimant implemented a new online time recording system known as TimeSite.

Overcharge due to inflated work hours recorded in timesheets

[19] It was subsequently discovered that between October 2014 and June 2015 there was a practice of recording and reporting inconsistent and inflated amount of work hours by the company's employees to justify raising higher invoices to the company's clients involving two projects, namely the Petronas Technical Integrity Performance System project ('the Petronas TIPS Project') and the Murphy Oil Asset Risk Management project ('Murphy Oil ARIM Project').

[20] Pausing here for a moment, it is fair to say that this issue of overbilling as a result of inflated timesheets was the root cause of the dispute between the company and the claimant that ended in this court.

[21] The issue of overcharging and inflated billing hours was raised during a

meeting in Kuala Lumpur on 23 October 2014 conducted by the company's Singapore based regional finance manager ('RFM') with the claimant's project and finance staff. The claimant was not present in the said meeting. There was an exchange of follow-up correspondence between the claimant and his colleagues.

Refund of overcharged amount

[22] An internal investigation was conducted by the RFM assisted by the regional legal counsel ('RLC'). Based on the investigation report dated 21 July 2015 prepared by the RFM and RLC which was approved by the RM, the company decided to refund the overcharged amount to its clients, namely Petronas and Murphy Oil.

Show cause letter

[23] On 7 December 2015 the claimant was issued with a show cause letter by the company. It was alleged that the claimant might have directly and/or indirectly involved in the issue of inaccurate recording of timesheets which led to overcharging of certain clients. For ease of reference, the contents of the said show cause letter are reproduced in verbatim as follows.

> i) As Country Manager, it is within your responsibility to ensure internal control in the Kuala Lumpur office. As such, you were aware or ought to have been aware that there was a practice of inflating timesheets with inflated hours. Nevertheless, DNV GL seeks your explanation as to why this practice continued despite your knowledge that the same was against DNV GL's policies;
>
> ii) Despite being informed of DNV GL's suspicion of the recording of Magic Hours as early as October 2014, you failed to take any steps to stop this practice from continuing in the Kuala Lumpur office in the recording of Magic Hours and/or had allowed this practice to continue despite being informed of the same;
>
> iii) DNV GL finds that by your failure to rectify the above, you have willfully and/or negligently allowed this practice to continue even after being cautioned as early as October 2014;
>
> iv) By your failure to rectify the inaccurate filing of the timesheets, you had willfully and/or negligently caused DNV GL to overcharge DNV GL's clients for the Petronas TIPS project as well as the Murphy Oil Project at the time of invoicing the actual project amount; and
>
> v) DNV GL therefore seeks an explanation from you as to why there was no action from you to curb this practice and/or why this practice continued despite being informed about DNV GL's views on this practice.

[24] On 18 December 2015 the claimant denied all allegations levelled against him.

[25] There were discussions between the regional manager and the claimant about a potential mutual separation. The negotiations were not successful.

Garden leave and re-designation

[26] On 29 February 2016 the claimant was placed on garden leave and was asked to hand over all company belongings, resign as directors of various companies within DNV GL group and his emails were redirected to the regional manager.

[27] On 10 March 2016 the claimant was re-designated as the Senior Principal Consultant without any change in basic salary save for a demotion in grade from Grade 13 to Grade 12. The claimant was one of four management employees who were assigned from the management track to the technical track as part of the company's disciplinary action.

[28] Apart from the claimant, there were 25 other employees who were disciplined for involvement in the overcharging and inflated work hours practice.

[29] By way of a letter dated 11 March 2016 the claimant disputed the demotion and considered it as a constructive dismissal by the company.

Industrial Court

[30] The claimant then filed his representation to the Industrial Relations Department and his representation was subsequently referred to the Industrial Court.

[31] The Industrial Court found for the company in that the constructive dismissal of the claimant was with just cause and excuse.

[32] In this regard the Industrial Court made the following material findings:

(a) while there might have been breaches in the investigations and disciplinary action, they were curable by a de novo hearing in court;

(b) the claimant was alerted at least twice regarding the overcharging to clients for the Petronas TIPS Project and the Murphy Oil ARIM Project;

(c) it was the claimant's responsibility to oversee that the timesheets were correctly stated, to ensure compliance, and to put into place safeguarding measures and internal monitoring systems;

(d) the claimant confirmed that he did not do checks, reviews or monitoring of the time sheet recording, and relied instead on 'blind trust'. If indeed he had been carrying out his responsibilities, he would have discovered the Magic Hours Practice;

(e) while there was no evidence that the claimant had been directly involved in the Magic Hours Practice, the Oil and Gas business organization in the company which carried out the Magic Hours Practice over several months, including the Project Manager for the Petronas TIPS Project and Murphy Oil ARIM Project, reported to him whether directly or indirectly;

(f) the claimant's admitted failures in his management role created questions concerning the appellants' business integrity; it caused embarrassment and put at stake the first to third appellants' reputation and business in Malaysia;

(g) the claimant did not carry out his responsibilities as country manager and was not suitable to continue in the management position of country manager; and

(h) on the issue of engagement of Tahir Naeem, the Industrial Court found that in view of the close proximity between Tahir Naeem, the claimant and the claimant's wife, in the context of Tahir's application for a job in the company, the claimant was in a conflicted position and his non-disclosure of the relationship showed an element of dishonesty.

[33] The claimant sought judicial review in the High Court of the said Industrial Court decision.

DECISION OF THE HIGH COURT

[34] The High Court allowed the claimant's application for judicial review and quashed the decision of the Industrial Court. We are now asked to reverse the High Court decision and restore the decision of the Industrial Court.

Submissions of the parties in the Court of Appeal the appellants' (company's) case

[35] It is the appellants' contention that the High Court exceeded its jurisdiction by treating the judicial review application like an appeal, quashing findings of the Industrial Court which were supported by evidence and substituting them with His Lordship's own findings unsupported by evidence and based on unpleaded grounds.

[36] The appellants in their submission raised seven grounds as below:

(a) as the Industrial Court's findings of fact were supported by evidence, the High Court ought not have disturbed those findings;

(b) the High Court substituted its own views of facts as if the judicial review involved an appeal and in so doing, misunderstood the law and made erroneous findings of fact, on which it based its decision;

(c) the learned judge had considered and misapplied the unpleaded point on proportionality of punishment;

(d) the learned judge had considered the principle of condonation which was not pleaded;

(e) the learned judge had made erroneous findings based on unpleaded grounds of judicial review;

(f) the learned judge had applied the wrong test; and

(g) the learned judge had made erroneous findings on Tahir Naeem.

The claimant's case

[37] The claimant in his 79-page submission zoomed in on two issues namely the appointment of Tahir Naeem and inflated timesheets. In so doing, the claimant took pains to demonstrate how the Industrial Court went wrong on its findings and defended the decision of the High Court.

DECISION OF THE COURT

[38] This is an appeal arising from a judicial review application in the High Court. In this regard it is noteworthy that the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1, made the following observation at para 69:

> A judicial review is a court proceeding where a challenge is made on the decision of the relevant authority or entity (in this case the appellant) ie, by challenging the lawfulness of the decision-making process. This is trite law. Generally, the court dealing with the judicial review application in a supervisory capacity is not to delve into the merits of the case. In other words, the evidence is not reassessed. The court is merely to quash the decision of the relevant authority, if need be, and not to substitute with what it thinks is the correct decision. We not here to usurp the powers of the designated authority.

[39] We are fully aware that this is an appeal that turns upon a question of fact. Upon careful scrutiny of the learned High Court judge's grounds of judgment we are convinced that the process of reasoning adopted by the learned High Court judge in arriving at certain conclusions and substituting the findings of the trial court with His Lordship's is in reliance of a wrong

premise and does not accord with a well-settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.

[40] The question that has to be answered is whether in fact there is evidence to justify the finding of fact by the learned High Court judge. It is generally accepted that an appellate court should not disturb the finding of a trial judge who had the advantage of seeing the witness and evaluating their credibility unless it can be shown that he had failed to use or palpably misused his advantage. See *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 5 MLJ 58; [2020] 6 CLJ 557, Supreme Court decision in *Chong Sooi Chuan v Yuen Lai Choon* [1988] 2 MLJ 443 and *Siti Aishah binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 per Abdul Hamid FJ (later Chief Justice of Malaysia) at p 126 where His Lordship quoted the Privy Council decision in *Yahya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117 'that it is only in a rare case that 'the appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility'. We also bear in mind, in this regard, the speech of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484 at p 487:

> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and it may be, the individual case in question.

[41] First, we accept the submission of the appellants that the learned High Court judge ought not have interfered with the findings of fact by the Industrial Court unless those findings were completely unsupported by evidence. See the Court of Appeal decision in *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493. In this regard, we are satisfied that the findings of fact made by the Industrial Court were clearly in accordance with the evidence adduced.

[42] On the contrary, the learned High Court judge arrived at certain erroneous findings wholly unsupported by evidence. At paras 16, 21 and 28 of the grounds of judgment, the learned High Court judge repeatedly referred the regional finance manager as the claimant's superior. Evidence led by parties showed otherwise. The evidence of the claimant and the company's regional manager shows that the claimant reported to the regional manager. The regional finance manager was not the claimant's superior. This misplaced position led the learned High Court judge to arrive at an erroneous conclusion that the regional finance manager, being the superior of the claimant was

entitled to give instructions to the claimant's subordinates and therefore the claimant did not need to deal with the inflated timesheets issue.

[43] Second, the learned High Court judge appears to have overlooked the inherent probabilities of the case resulting in His Lordship making inconsistent findings on the question of knowledge on the part of the claimant about the inflated timesheets practice and the appointment of Tahir Naeem.

[44] On the issue of knowledge regarding the inflated timesheets practice, evidence was led to show that the February 2015 audit discovered incorrect time entries and constituted the second alert on the issue of inflated timesheets to the claimant. In this instance the audit report revealed that the project manager did not follow the specification related to personnel category set in the contract when applying the rate, and the recommendation from audit with regard to this item was to watch this carefully. This necessarily meant that the client was not being charged accurately. This was in fact accepted by the claimant under cross examination:

> SKK: So the effect of this recommendation is this is the second alert given to you that your personnel were not following contractual specifications when charging clients, right?
>
> Raza: Yes.

[45] Yet, the claimant's position was a total denial of the discovery of incorrect time entries. At para 35 in p 42 of his submission, the claimant contended as follows. 'As for the February 2015 Audit, this did not result in any finding of time sheet inflating conduct which the claimant could be said to have been alerted ...'.

[46] Notwithstanding the evidence was abundantly clear, the learned High Court judge concluded at para 18 of the grounds of judgment that nothing on inflated timesheets was discovered in the February 2015 audit and the claimant was unaware of the practice of inflating timesheets. In clear contradiction, the learned judge found at para 13 of the grounds that the claimant was aware of the inflated timesheets practice since 2014. Further inconsistent finding at para 21 of the grounds, the learned High Court judge found that the claimant was not aware of the inflated timesheets practice in June 2015.

[47] The learned High Court judge ought to have asked himself whether it was inherently probable that first, the issue of inflated timesheets was discovered in the February 2015 audit and second, the claimant, on this isolated instance, in his capacity of the country manager in charge of the Oil and Gas division, was aware of the inflated timesheets practice by his personnel. Had the learned High Court judge done so, he would, upon a proper

assessment of the totality of the evidence, have come to the conclusion that the claimant's version was wholly improbable.

[48] Next, on the appointment of Tahir Naeem. The learned High Court judge made an erroneous finding that the claimant was not involved in the recruitment of Tahir Naeem at para 47 of the grounds of judgment. This finding is plainly wrong in light of the evidence that first, it was the claimant who forwarded Tahir's curriculum vitae to the Human Resources Manager; second, the claimant signed off the decision to recruit Tahir as well as his remuneration package. The learned High Court judge finding ran counter to the evidence led in court.

[49] So, here we have a case where there was insufficient judicial appreciation by the learned High Court judge of the evidence placed before him. The principles of law governing such a case is clear.

[50] In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* (1942) 73 Lloyd LR 217:

> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against the. [Which, we hasten to add, is not the case here.] I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us in overthrowing that has already been decided. *If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view* — in these mundane happenings there is no more conclusive argument than *non est credendum quia impossible. If the impeached decision were shown to be an unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.* If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed.

[51] Further, in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430, Lord Pearce's dissenting speech contains the following valuable reminder:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. *It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions.* Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally

make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

[52] We are satisfied that if the learned High Court judge adopted the correct approach to the evaluation of evidence, we have no doubt that the learned High Court judge would have affirmed the decision of the Industrial Court.

[53] Third, on the issue of proportionality, we took guidance from the Federal Court decision in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605 as follows:

> [36] Thus, in reference to the questions posed to us, we are of the view that the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s 20(3) of the IRA. We are further of the view that the Industrial Court in exercising the aforesaid functions can rely on its powers under s 30(5) of the IRA based on the principle of equity, good conscience and substantial merit of the case.
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> [37] Clearly, the reference by the Federal Court in *Milan Auto*'s decision to the 'twofold' test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under s 30(6) in making an award which provides: ...
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> [39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[54] It is our considered view that the learned High Court judge's finding that the claimant's 'dismissal' was clearly 'disproportionate and too harsh under the circumstances' was not reasonable. This is as the claimant was re-designated to the most senior technical position without any change in his basic salary especially taking into account the severity of the inflated timesheets practice which resulted in overcharging of the company's clients.

[55] We accept the Industrial Court's finding that the claimant was dismissed with just cause of excuse as the claimant was not the only employee to have faced consequences in respect of the inflated timesheets and overbilling practice. Further, evidence led shows that it was common practice within DNV GL for any employee to be transferred or re-assigned between the management and technical grades. The re-designation was consistent with the terms of the claimant's contract of employment. There was no guarantee in the contract of

employment that the claimant would remain the country manager until his retirement. After all, the Industrial Court observed that the company 'was justified in losing its trust and confidence in the claimant as Country Manager' at para 41 of the award and that the claimant was not suitable to continue in the management position of country manager at para 30 of the award.

[56] On the point of condonation, we are of the view that it is not necessary for the court to consider as it was not pleaded. The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 held as follows:

> [29] There is no reason to depart from the above view. Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. Thus, the Industrial Court's duty, to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form under s 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principal Act.
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> ...
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> [31] The Court of Appeal has reproduced the applicant's statement of case in full in its judgment and found that the issue of victimization was never pleaded. From the statement of case reproduced there is no doubt that the issue of victimization was never pleaded. It was not a ground advanced by the appellant. As such the Industrial Court cannot act on a ground which was not advanced in a pleaded case. Section 30(5) of the Act cannot rescue the appellant's case.

[57] We do not accept the reasoning ventilated by the claimant through his submission on the issues highlighted above. There is no need for us to consider other grounds of appeal as they are related or similar to the grounds which we have dealt with in our analysis above.

[58] Accordingly, it is our considered view that there were various appealable errors as highlighted above on the part of the learned High Court judge in allowing the judicial review application. We are also of the view that there is a serious misdirection on the part of the learned High Court judge which warrants the appellate intervention on the decision and order of the High Court. Appeal is therefore allowed with the mutually agreed costs of RM15,000. The decision and order of the High Court are set aside. We reinstate the award of the Industrial Court.

Appeal allowed; decision and order of the High Court set aside; and decision of the Industrial Court reinstated.

Reported by Ashok Kumar